No. 3931

In the United States Circuit Court of Appeals

For the Ninth Circuit

BURRELL JOHNSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. FRANK RUDKIN, *Judge.*

BRIEF OF DEFENDANT IN ERROR.

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STATEMENT OF THE CASE

The defendant, Burrell Johnson, a wholesale newspaper vendor, was convicted for violation of the Dyer Act for transporting a stolen automobile. The facts show that the defendant and his wife arrived in Providence, Rhode Island, in an automobile on November 7, 1921. On November 8th he applied for a license for a Nash car at the State House, and

at that time he gave the number of the car and the engine data to the State official. On November 10, 1921, Dr. Wilfred Crabtree left his car in front of a building in Providence, Rhode Island, and this car was stolen on that afternoon. Dr. Crabtree's car was found in the possession of the defendant in Seattle on February 15, 1922 bearing the numbers of the license applied for on November 8. It was then discovered that the true numbers of the Crabtree car had been removed and other Nash numbers had been placed upon the car. This condition was visible upon inspection of the automobile.

The defendant maintains that he purchased the car, in answer to an advertisement that was placed in the Providence papers on November 7, and that after an inspection of the car traded his Studebaker automobile after removing from it certain personal equipment, and after an examination and inspection of the stolen Nash car. The defendant is a man who, according to his own testimony, has owned ten or twelve used cars and is familiar with the various makes of cars. At the time of the trial he owned three used cars and used them in his business of distributing newspapers.

There is no question in the case that the car was stolen from Dr. Crabtree, and there is no question

that the defendant was found in possession of the stolen car at Seattle, Washington. The defendant does not deny that he transported and removed the car from Providence, Rhode Island, but denies that he had any guilty knowledge of the matter. The evidence presented by the government is substantial, and the rebuttal evidence of the defendant is negative testimony.

ARGUMENT

It is contended in the brief of the appellant that the facts of this case are entirely consistent with his innocence and that he should not be convicted for stupidity. The Government contends that the facts in the case show a cool and deliberate act of theft, well planned and carefully executed. The Government's operative, Mr. Read, testified at the trial that the defendant at the time of his arrest stated he did not have a bill of sale and did not remember the man from whom he had bought the car, nor did he remember the locality of its purchase in Providence. (Tr. p. 28 and 29). Mr. Worsham, a member of the police force of Seattle, testified that the motor plates when the hood was lifted from the stolen car showed that they had been "jimmied" and the plates taken off

and put on again. This was also testified to by Government witnesses Smith (Tr. p. 33), Worsham (Tr. p. 32), and Read (Tr. p. 29). Mr. Read further testified (Tr. p. 30), that the defendant owned so many cars in the City of Seattle that it was impossible for him to determine when Washington licenses had been issued on particular cars. The defendant himself tells the court that he was familiar with second hand automobiles (Tr. p. 39), and also that at the time he purchased the car he went over and examined the tool equipment and tires, etc. (Tr. p. 36). We have then before this court a man who could very easily because of his experience remove the plates from the machine, transfer them to another machine, and steal a car, or purchase a stolen car, and avoid detection. We have a man familiar with used cars in a strange city, purchasing from a party whom he has never met an automobile without any investigation as to the man's responsibility, or any search as to the title of the machine. We have a man familiar with used cars buying, on sight, unseen, according to his own testimony, an automobile, but we have the controlling and positive evidence of his guilty knowledge in the one mistake the defendant made, and that is his application two days before the theft

for a Rhode Island license upon plates which he had in his possession so that he could cleverly avoid any detection by the Rhode Island authorities. A careful consideration of this one flaw in the defendant's action leads one to believe that the defendant is not only guilty in this instance, but is one who was graduated from the school of crime. If the Rhode Island license had been taken out on a car on November 10th, then upon Dr. Crabtree's report to the Rhode Island authorities a search of the records would have disclosed the sale of a used car to the defendant, and of course would have resulted in his immediate apprehension and the recovery of the car. However, if a license had been issued on a car with the defendant's name plate and number two or three days prior to the theft, then the average police officer would not begin his search in the Rhode Island records for the detection of the crime until after November 10th, because no theft had occurred prior to that time, and there would be no reason for such a search. The defendant could then drive through the various cities, visit different automobile houses without any fear of detection because the number plates on his Nash car would not correspond to the number plates on the stolen car. There is no explanation in this case, and there can

be none, of how the defendant on November 8th purchased a car that was not stolen until two days later. There is no explanation in this case, and there can be none, of how the thief changed these name plates, advertised the car, and sold it, or how the defendant could procure a license in Rhode Island without exciting the suspicion of the police unless the theft had been committed and the license issued prior to the time fixed by the defendant. There is even contradiction in how he come by the money to buy the car (Tr. p. 45). There are no perfect crimes. And there never will be any. Some place or other the law violator will in the conceit of his own cleverness make some false step that will lead the law to his door. In this case it may well be said that while this crime may possess many clever angles, the defendant's one mistake was in applying for his license prior to the date of the theft. It would be unreasonable to suppose that this theft could occur in a staid, old New England city, and an advertisement placed in the paper without the automobile detail in that city making an investigation of all Nash cars advertised for sale. There is nothing in this record to show that the defendant ever made an attempt to procure the newspaper seen by him when he made the purchase, which

would be a very material part of his defense, but he relies upon the vague statement that he saw this advertisement in the newspaper and acted upon it. This case is the usual crime in one particular—and that is the presence of a mystery man, the vendor of the stolen automobile, whose name is not known, whose residence is unknown, and whose evidence of title which he presented to the defendant is missing. Whenever a defendant reaches a stage in his career when he cannot explain how certain things happened, the blame is always placed upon one who is unknown, uncoffined and unsung. There is also another angle to be considered in this case, and that is the application by the defendant for a Rhode Island license upon the purchase of this stolen car. The average motorist is not anxious to spend money for licenses, and if the defendant owned a Studebaker automobile which he was trading for the stolen Nash car, he would have removed his Washington license plates, and in the ordinary course of dealings placed the new license plates on the stolen car in order to relieve himself of further expense. But this defendant is not the average motorist because he is puchasing a stolen car, or has himself stolen the car and must avoid any and all suspicious circumstances. He therefore applies for a license and abandons his Washington license.

THE VERDICT TESTIFIED

The defendant's brief raises the question of the sufficiency of evidence to justify conviction. The trial judge refused his motion for a directed verdict because it is assumed he believed that the question of the guilt or innocence of the defndant was for the jury. The decisions of the courts are uniform on this subject that the question of the sufficiency of evidence belongs to the jury. The following two cases succintly state the law:

> "Where there is some evidence tending to establish a fact in issue, the jury must judge of its sufficiency. *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639."
>
> "Whether the evidence before a jury does or does not sustain the allegations in a case is a matter wholly within the province of the jury, and if they find in one way, this court cannot review their finding. *Gregg v. Moss*, 14 Wall. 564, 20 L. Ed. 740."

Another case which is point is *Kelly v. United States*, 277 Fed. 408, which states:

> "We need not comment upon this evidence. In our judgment it was clearly sufficient to make a case for the jury to determine whether defendant bought and transported the car in question, 'knowing the same to have been stolen,' and the trial court, therefore, did not

> err in refusing to direct a verdict in his favor for lack of proof of guilty knowledge."

Chass v. United States, 258 Fed. 914 (C.C.A. 3d Circuit) involved the receipt of stolen goods, which is very similar to transporting a stolen automobile, and in that case there were contradictory statements as in this case and other circumstances, but Judge Haight, speaking for the court said:

> "It was unquestionably for the jury to decide whether either of the explanations which he gave was true, and, if neither were, they were certainly justified, in the light of the other circumstances in the case, in reaching the conclusion that he knew or believed that the goods had been stolen when he acquired them."

And this statement might be well said of this case that if the jury believed that the defendant honestly came by this car after viewing him and hearing his testimony and considering all the other circumstances of the case, it might have acquitted him, but not believing his statements and believing the Government's witnesses they could find him guilty. It was unquestionably for their decision. See also *Clark v. United States*, 258 Fed. 439. Also *Sobolouski v. U. S.*, 271 Fed. 294. In *Degnan v. United States*, 271 Fed. at pages 292 and 293 it was said:

> "It is true that the essence of the crime whereof this plaintiff in error was charged is guilty knowledge, and that such knowledge must be brought home to the accused by competent, though perhaps circumstantial evidence."

This case also announces a rule which is the fixed rule of the court when it said:

> "By assignments of error, we are asked to review the weight of evidence—something so plainly beyond the power of an appellate court of the United States in a criminal cause, or in an action at common law, that citation has long been superfluous."
>
> *Cuomo v. United States*, 231 Fed. 117;
> *Soblowski v. United States*, 271 Fed. 294.

There is also another phase of the case to be considered, and that is the recent possession of a stolen car which, while not conclusive, is very damaging evidence, as was said in *Rosen et al v. United States*, 271 Fed. 655:

> "The possession of stolen property, standing alone, does not establish guilt. But the possession of property recently stolen raises a presumption of guilt which in the absence of explanation may authorize a jury to inter a criminal connection with its acquisition. *Wilson v. United States*, 162 U. S. 613, 620, 16 Sup. Ct. 895, 40 Law. Ed. 1090; *People v. Weldon*, 111 N.Y. 569, 576, 19 N.E. 279."

And also in

Wilson v. United States, 162 U. S. 1095, 40 L. Ed. 1090:

"Possession of the fruits of crime recently after its commission justified the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence."

See also

Le Fanti v. United States, 259 Fed. 464.

The case of *Peterson v. United States*, 213 Fed. 922, involved receipt of stolen cattle, and it was said:

"It is not required that he should see the thief taking the property, or that the thief should have told him he stole the property. Knowledge may be inferred from circumstances. Anything amounting to notice, whether such notice be direct or indirect, positive or inferential, will satisfy the statute."

See also

Pounds v. United States, 265 Fed. 245;
Cohen v. United States, 277 Fed. 771;
Kelly v. United States, 277 Fed. 405;
Katz v. United States, 281 Fed. 129.

In conclusion the government respectfully contends that a clever and deliberate law evader has

been brought before the court, fairly tried, and convicted. Every criminal prosecution involving the receipt of stolen property rests largely upon circumstantial evidence. When the circumstances lend themselves to the innocence of the defendant or to the guilt of the defendant, as the jury may believe the various witnesses, then it is within their province to decide. There is nothing unusual in the case of the defendant's denial of guilty knowledge. All defendants who stand trial deny their connection with crime. But this defendant has not shown how he came by this car by any other evidence than his own testimony. He has not clearly shown how he came by the money to purchase the car, and the defendant's own statements to the Government's investigator and the police officers of the City of Seattle show, circumstantially it may be admitted, but definitely, that the defendant had knowledge of a theft. No man schooled as the defendant was in the use of second hand automobiles could have purchased a car that bore upon its face the marks of crime. Circumstances when they are unexplanable are more reliable than the living words of witnesses because they do not rest upon the tender mercy of memory. In this case the defendant in error is looking to submit its theory upon

the unexplained and unexplainable action of the defendant in procuring the license two days before the theft of the car. This circumstance alone would be sufficient for the trial court to refuse to sustain any motion for dismissal or directed verdict made by the defendant, and also justify a jury in coming to the conclusion of the defendant's guilt. The conviction should stand on the record and the finding of the jury.

Respectfully submitted,

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